

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JARED L. COPE and JONEA C. COPE,

Plaintiff,

v.

WINCO FOODS, LLC,,

Defendant.

No. CV-07-5064-FVS

ORDER DISMISSING STATE  
CLAIMS

**THIS MATTER** comes before the Court based upon the defendant's motion to dismiss two claims that are based upon state law. The defendant is represented by Francis L. Van Dusen, Jr. The plaintiffs are represented by Janet Taylor.

**BACKGROUND**

Jared Cope was employed by WinCo Foods, LLC, as the manager of one of its meat departments. He was a member of WinCo Foods #45 Department Manager Hourly Employee Association. As a union member, his employment relationship with WinCo was governed by a collective bargaining agreement ("CBA"). During July of 2007, WinCo fired Mr. Cope for allegedly using racial slurs and tolerating his subordinates' use of ethnic slurs. He invoked the CBA's grievance procedure. The first step in the grievance process was a hearing before the Department Head Committee ("Committee"). On July 31, 2007, the Committee directed Winco to reinstate Mr. Cope with back pay,

1 benefits, and seniority. According to Mr. Cope, a representative of  
2 WinCo told him during August that the company was not going to  
3 reinstate him as the manager of a meat department. Instead, he would  
4 have to work in some lesser position. Mr. Cope says he told the WinCo  
5 representative that he was unwilling to accept the terms the company  
6 was offering. This led to an impasse. Eventually, WinCo construed  
7 Mr. Cope's refusal to accept any position other than meat department  
8 manager as a decision to quit working for the company. Mr. Cope and  
9 his wife filed an action against WinCo. They have pled several causes  
10 of action: First, Mr. Cope alleges WinCo breached the CBA by failing  
11 to reinstate him. He seeks relief for the breach under the National  
12 Labor Relations Act ("NLRA"). 29 U.S.C. § 185. Second, he alleges  
13 WinCo retaliated against him for filing the grievance by refusing to  
14 reinstate him to his former position as a manager. He seeks relief  
15 for retaliation under both the NLRA, 29 U.S.C. § 158, and the law of  
16 the State of Washington. Finally, Mrs. Cope alleges a loss of  
17 consortium as a result of WinCo's tortious conduct. She seeks relief  
18 under Washington common law.

#### 19 **RULING**

20 Mr. Cope alleges that Winco's refusal to reinstate him to his  
21 former position violates RCW 49.32.020 and gives rise to a cause of  
22 action in tort. Mr. Cope's claim is based largely, but not entirely,  
23 upon *Bravo v. Dolsen Co.*, 125 Wn.2d 745, 888 P.2d 147 (1995). In  
24 *Bravo*, the Supreme Court of the State of Washington held that  
25 nonunionized workers stated a claim for wrongful discharge in  
26 violation of public policy based upon their allegation that their

1 former employer discharged them in retaliation for attempting to  
2 secure better working conditions. *Id.* at 748, 759.

3 WinCo argues that Mr. Cope's state retaliation claim is preempted  
4 under the *Garmon* doctrine. *San Diego Bldg. Trades Council v. Garmon*,  
5 359 U.S. 236, 243-44, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). "The  
6 *Garmon* doctrine holds that the national interest in having a  
7 consistent body of labor law requires that the [National Labor  
8 Relations Board] have exclusive jurisdiction to regulate activit[ies]  
9 that . . . arguably constitute unfair labor practices." *Adkins v.*  
10 *Mireles*, 526 F.3d 531, 539 (9th Cir.2008). "'When it is clear or may  
11 fairly be assumed that the activities which a State purports to  
12 regulate are protected by § 7 of the [NLRA], or constitute an unfair  
13 labor practice under § 8, due regard for the federal enactment  
14 requires that state jurisdiction must yield.'" 526 F.3d. at 538  
15 (quoting *Garmon*, 359 U.S. at 244, 79 S.Ct. at 779).<sup>1</sup>

16 Pursuant to the *Garmon* doctrine, Mr. Cope's state retaliation  
17 claim is preempted if it is identical to a claim that could have been,  
18 but was not, presented to the National Labor Relations Board ("NLRB").  
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20 <sup>1</sup>*Garmon* is not the only preemption doctrine that is based  
21 upon the National Labor Relations Act. Another is the *Machinists*  
22 doctrine. See *Machinists v. Wisconsin Employment Relations*  
23 *Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).  
24 Furthermore, the NLRA is not the only federal labor statute that  
25 has preemptive effect. Section 301 of the Labor Management  
26 Relations Act ("LMRA"), 29 U.S.C. § 185, also preempts state  
regulation in certain circumstances. See, e.g., *Allis-Chalmers*  
*v. Lueck*, 471 U.S. 202, 209-10, 105 S.Ct. 1904, 1910-11, 85  
L.Ed.2d 206 (1985).

1 See *Sears, Roebuck & Co. v. San Diego County District Council of*  
2 *Carpenters*, 436 U.S. 180, 197, 98 S.Ct. 1745, 1757, 56 L.Ed.2d 209  
3 (1978). As indicated above, the critical inquiry is "whether the  
4 conduct at issue was arguably protected or prohibited by the NLRA."  
5 *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 394, 106 S.Ct.  
6 1904, 1914, 90 L.Ed.2d 389 (1986). Thus, the Court's first task is to  
7 determine whether the acts that give rise to Mr. Cope's state  
8 retaliation claim fall within the scope of either § 7 or § 8 of the  
9 NLRA.

10 Section 7 states, in part, "[e]mployees shall have the right to  
11 self-organization, to form, join, or assist labor organizations, to  
12 bargain collectively through representatives of their own choosing,  
13 and to engage in other concerted activities for the purpose of  
14 collective bargaining or other mutual aid or protection[.]" 29 U.S.C.  
15 § 157. Under Section 7, an employee has a right to file a grievance  
16 pursuant to a grievance process that has been established by a  
17 collective bargaining agreement. *Ad Art, Inc. v. NLRB*, 645 F.2d 669,  
18 678 (9th Cir.1980). Consequently, Mr. Cope's act of filing a  
19 grievance was protected by Section 7.

20 Section 8(a)(1) makes it an unfair labor practice for an employer  
21 "to interfere with, restrain, or coerce employees in the exercise of  
22 the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1). An employer  
23 who retaliates against an employee for filing a grievance commits an  
24 unfair labor practice under Section 8. *Ad Art, Inc.*, 645 F.2d at 678.  
25 Thus, if WinCo's refusal to reinstate Mr. Cope to his former position  
26 was, in fact, motivated by a desire to retaliate against him for

1 successfully invoking the grievance process, then WinCo committed an  
2 unfair labor practice under § 8. Which is precisely what Mr. Cope  
3 alleges in his complaint.

4 It is clear, then, that the facts which give rise to Mr. Cope's  
5 state retaliation claim fall within the scope of sections 7 and 8 of  
6 the NLRA. To begin with, filing a grievance is protected by § 7.  
7 Moreover, retaliating against a grievance filer is prohibited by § 8.  
8 Since the acts that give rise to Mr. Cope's state retaliation claim  
9 fall within the scope of sections 7 and 8, he could have presented an  
10 identical claim to the NLRB. Thus, under the *Garmon* doctrine, his  
11 state retaliation claim is preempted. It must be dismissed for lack  
12 of subject-matter jurisdiction.

13 Mrs. Cope brings a separate claim for loss of consortium. In  
14 this context, she is referred to as the "deprived spouse"; her husband  
15 as the "impaired spouse." *Lund v. Caple*, 100 Wn.2d 739, 744, 675 P.2d  
16 226 (1984). One of the elements she must prove is a tortious injury  
17 to her husband. See, e.g., *Oltman v. Holland America Line USA, Inc.*,  
18 163 Wn.2d 236, 250, 178 P.3d 981, cert. denied, --- U.S. ----, 129  
19 S.Ct. 24, 171 L.Ed.2d 927 (2008); *Reichelt v. Johns-Manville Corp.*,  
20 107 Wash.2d 761, 774, 733 P.2d 530 (1987). Mrs. Cope alleges her  
21 husband suffered a tortious injury by virtue of WinCo's retaliatory  
22 refusal to reinstate him to his former position. As explained above,  
23 Mr. Cope's state tort claim is preempted by federal law. In other  
24 words, she cannot prove a tortious injury to her husband in violation  
25 of state law. All that remains are alleged violations of federal  
26 labor law. Mrs. Cope has failed to establish that any of the

1 remaining violations alleged by her husband can serve as a basis for a  
2 state loss-of-consortium claim. It follows that her claim must be  
3 dismissed. *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847,  
4 853, 728 P.2d 617 (1986) ("deprived" spouse cannot bring a loss-of-  
5 consortium claim absent a tortious injury to the "impaired" spouse).

6 **IT IS HEREBY ORDERED:**

7 1. The defendant's motion for a ruling (**Ct. Rec. 82**) is granted.

8 2. The defendant's motion to dismiss (**Ct. Rec. 42**) is granted in  
9 part:

10 (a) Mr. Cope's state retaliation claim is dismissed.

11 (b) Mrs. Cope's loss-of-consortium claim is dismissed.

12 **IT IS SO ORDERED.** The District Court Executive is hereby  
13 directed to enter this order and furnish copies to counsel.

14 **DATED** this 2nd day of March, 2009.

15 s/Fred Van Sickle  
16 Fred Van Sickle  
17 Senior United States District Judge  
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